APPENDIX

TABLE OF CONTENTS

Order denying Petition for Rehearing dated November 26, 1999, by the United States Court of Appeals for the Third Circuit 1A

Memorandum Opinion of the United States Court of Appeals for the Third Circuit affirming District Court Order, filed November 1, 1999 ..... 3A

Judgment Order, dated November 1, 1999, by the United States Court of Appeals for the Third Circuit 9A

Civil Complaint filed with United States District Court for the Western District of Pennsylvania 11A

Rule 50 Motion for Judgment as a Matter of Law 22A

Transcript excerpt - DeCree Direct 29A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3010

DEBORAH M. BORODATY; DORENE HAZELBAKER,

vs.

WEST PENN POWER COMPANY, INC., a Pennsylvania Corporation,

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL BARRY, and WEIS,* Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority

of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann

---

*Senior Circuit Judge Weis voted only as to panel rehearing.

Nov 26 1999

. UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3010

DEBORAH M. BORODATY;
DORENE HAZELBAKER,
Appellants

v.

WEST PENN POWER COMPANY, INC., a
Pennsylvania corporation

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 97-cv-00163)
District Judge: Honorable Alan N. Bloch

Submitted Under Third Circuit LAR 34. 1 (a)
October 28, 1999
Before: MANSMANN, ROTH and WEIS, Circuit
Judges.

(Filed November 1, 1999)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Deborah Borodaty and Dorene Hazelbaker, plaintiffs in an action alleging that West Penn Power Company maintained a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, appeal from an order of the District Court granting West Penn's motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, on a portion of the Title VII claim. Specifically, the plaintiffs challenge the District Court's conclusion that there was insufficient evidence to submit to the jury claims that West Penn employees contributed to a hostile work environment by peering into women's restroom and locker facilities.[1] We have reviewed the record in his matter

[1]The District Court's grant of the Rule 50 motion with respect to "peering" did not include the other elements of the plaintiffs hostile work environment claim - inadequate investigation of the alleged peering; jokes, teasing, and humiliating comments by male employees; gender-based discrimination in work assignments; offensive photographs and calendars; and failure to take seriously female employees' complaints. Following the District Court's ruling that there

and the law governing the elements of a successful hostile work environment claim, and are convinced that the grant of West Penn's motion for judgment as a matter of law was appropriate. We will, therefore, affirm the order of the District Court.

I.

The parties are well familiar with the factual and procedural history of this matter. We refer to that history, therefore, only to provide context for our conclusions of law.

In Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990), we set forth five elements of a successful hostile work environment claim against an employer. A plaintiff is required to show that: (1) the employee suffered intentional gender discrimination; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff-,

---

was insufficient evidence to support the peering portion of the case, the plaintiffs themselves withdrew all other claims relating to alleged sexual harassment. Counsel for the plaintiffs stated: "In view of the Court's ruling on the Rule 50 motion we would choose not to proceed to the jury on those remaining facts." (647a).

(4) the discrimination would detrimentally affect a person of the same sex in that position; and)5) respondeat superior liability existed. Out focus in this matter is on the first element, and the District Court's conclusion that: "[T]here [was] insufficient evidence from which a reasonable jury could find that peeking took place at all...." (634a). "[T]here isn't sufficient evidence to prove that thepeeking occurred." (644a).

A Rule 50 motion should be granted only if, viewing the evidence in the light most favorable to the non-moving party and according that party the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability. Coleman v. Kaye, 87 F.3d 1491, 1496 (3d Cir. 1996), cert. denied, 519 U.S. 1084 (1997).

At the close of the evidence, the District Court concluded that the plaintiffs had failed to present sufficient evidence that peeping took place. Although the undisputed evidence showed that West Penn employees occupied the area over the women's

facilities, the evidence also showed that their presence was legitimate, i.e., employees were in that area in order to repair duct work and effect asbestos removal. All of the evidence introduced by the plaintiffs with respect to the condition of and activities above the ceiling of the women's facilities was consistent with West Penn employees' legitimate presence. In this respect, the circumstances here differ from those present in the case upon which the plaintiffs place primary reliance, Liberti v. Walt Disney World Co., 912 F. Supp. 1494 (M.D. Fla. 1995).

In Liberti there was no reasonable explanation for holes drilled in the walls of the women's dressing room; the inference of improper peering there was not undercut by any allegation of legitimacy. Here, however, each of the items of evidence introduced by the plaintiffs is susceptible to benign interpretation. We agree with the District Court that submitting the issue of peering to the jury based on the evidence in this record would have invited speculation. As a result, we conclude that the District Court's grant of West Penn's

motion for judgment as a matter of law was appropriate.

II.

Because we have failed to find merit in the allegations of error made by the plaintiffs, we will affirm the order of the District Court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Carol Los Mansmann
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-3010

DEBORAH M. BORODATY;
DORENE HAZELBAKER,
Appellants

v.

WEST PENN POWER COMPANY, INC.,
a Pennsylvania corporation

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civ. No. 97-cv-00163)
District Judge: Honorable Alan N. Bloch

Before: MANSMANN, ROTH and WEIS, Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of Pennsylvania and was submitted under Third Circuit LAR 34. 1 (a) on October 28, 1999.

On consideration whereof, it-is now here ordered- and.adjudged by this court that the judgment of the District Court entered on December 8, 1998, be and the same is hereby affirmed.

Costs taxed against the appellants.

ATTEST:
/s/ P. Douglas Fisk
Clerk

Dated: November 1, 1999

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH M. BORODATY and :
DORENE HAZELBAKER,

Plaintiffs, : No. 97-0163

v. :

WEST PENN POWER COMPANY, :
INC., a Pennsylvania
corporation,
Defendant.

CIVIL COMPLAINT

AND NOW, come the Plaintiffs, Deborah M. Borodaty and Dorene Hazelbaker, by and through their counsel, Peter M. Suwak, Esquire, and Dale M. Brown, Esquire, who file this Complaint based upon the following:

1. Plaintiff Deborah M. Borodaty is an adult individual who resides at 8 Mary Ellen Street, Monongahela, Washington County, Pennsylvania, 15603.

2. Plaintiff Dorene Hazelbaker is an adult individual who resides at RD#4, Box 212, Belle Vernon, Westmoreland County, Pennsylvania, 15012.

3. Defendant West Penn Power, Inc., is a public utility organized under the laws of the Commonwealth of Pennsylvania responsible for the generation and sale of electric power, is the employer of numerous individuals including the Plaintiffs, and is the owner of a certain facility here at issue, Mitchell Power Station, located at Route 837, with a mailing address of Box 282, Monongahela, Washington County, Pennsylvania, 15063. Defendant West Penn Power, Inc.'s main office is located at 800 Cabin Hill Drive, Greensburg, Pennsylvania, 15601, is a wholly owned subsidiary of Defendant Allegheny Power System, Inc., and is incorporated in Pennsylvania.

4. Federal Court jurisdiction is based upon 28 U.S.C. §§1337,1343, and 42 U.S.C. Section 2000e-S(f)(3)(P.L. 88-352 Title VII, §708 (b). This action is authorized and instituted pursuant to §706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964 (42 U.S.C 920OOe-5(f)(1) and (3)).

5. The Defendant is an "employer" within the meaning of Section 701(d) ofTitle VII in that it is a person engaged in industry affecting commerce and employs and

has employed at all relevant times, a requisite number of persons; and is a "person" within the meaning of Section 701(a) of Title VII.

6. The Plaintiffs are two female employees who work as a part of the general labor force for the Defendants at their Mitchell Power Station facility. The Defendant provides restroom and shower facilities for male and female members of the labor force. These facilities are separate with separate facilities designated for use soley by the female employees.

7. On or about October 27, 1994, it was discovered that persons had gained access to the ceiling area above the women's showers and restroom. This was based upon a finding of dirt on the toilets that could only have come from the ceiling above. Company explanations that a blower was responsible was disproved by the location of the duct compared to other locations. This is a recurrence of a similar event as described in later paragraphs below. The company has failed to undertake adequate precautions to protect against recurrence.

8. Earlier in October of 1991, female management personnel had mentioned to the Plaintiffs a suspicion that another employee and/or employees may be observing the women during the course of showers and/or other restroom activities.

9. Based upon this information, Plaintiffs undertook an investigation of the facility and determined that there existed access to the ceiling overlooking the women's showers and rest rooms.

10. A visual inspection revealed that insulation material had been pulled back from the areas of the ceiling overlooking the shower area and restroom stalls. Empty beverage cans and cigarette butts were also found.

11. Immediate complaints were made to Union representatives management personnel.

(a) The Union indicated that it would not handle the matter nor process the grievance because it anticipated the necessity to defend employees who might become charged with misconduct.

(b) Following delays, management initiated an investigation. However, investigating personnel appeared to engage in obstructive tactics, such as misstating the statements of the complaining employees.

(c) No effective remedial action was taken. The women themselves were forced to paint over the visual peeping access holes through the ceiling tile. Additionally, the women discovered additional access ways to the ceiling area.

(d) Subsequently, a West Penn Power, Inc. employee was arrested for extortion, apparently threatening to expose a fellow employee as an alleged sexual pervert and/or peeper. Charges were dropped against the employee when another individual plead guilty.

(e) The company cooperated with the alleged pervert/ peeper, providing a company vehicle to transport him to various court proceedings to prosecute an alleged extortionist. No action was taken against the alleged pervert/peeper.

12. Following disclosure of the evidence that the women had been subject to unauthorized viewing while nude in the shower the Plaintiffs became the subject of numerous jokes, substantial teasing and otherwise subject to humiliating comments by male employees. Said jokes, teasing and humiliating comments continue to the present.

13. Other observations/peeping incidents occurred at other West Penn Power, Inc. facilities prior to discovery of these events at the Mitchell Power Station, located at

Route 837 in Monongahela, Washington County, Pennsylvania.

14. Based upon the foregoing, the Plaintiffs have been subjected to a continual pattern of practice of discrimination and harassment based upon their sex as follows:

(a) Complaints against male employees are not taken seriously.

(b) Work assignments are not divided on a non-discriminatory basis.

(c) Lewd and humiliating remarks and comments by male employees are tolerated.

(d) Offensive photographs and calendars are permitted to be displayed in the work areas.

(e) A hostile work environment and/or atmosphere has been created.

15. The alleged "peeper" has exposed himself (exhibition of sexual organs and/or touching of personal private parts in view) to at least three (3) women at the plant, including Plaintiff Borodaty. This offensive conduct, including the peering here at issue, would normally not be considered a part of the proper employer/employee

relationship, is an offensive and undersireable personal trait, and should not be tolerated by management.

16. Defendant knew or should have known that the premises should have been provided with adequate security in order to protect the privacy and other rights of the female employees in their shower and/or restroom area. This is particularly true since Defendant had notice of the prior activity from 1991, yet permitted the activity to recur in 1995.

16. Despite being fully aware of the danger of privacy invasion and/or other offensive acts against the female

employees, Defendant failed to make reasonable, adequate and necessary provisions for their security including, but not limited to:

A. Controlling access to the ceiling areas by locking and/or otherwise securing grates, tiles and/or other access routes.

B. Partitioning the women's shower/restroom area in the ceiling to insure those with access to the ceiling would not overlook the women's shower areas.

C. The Respondent's breach of duty to provide their employees with adequate building security enhanced the likelihood that offensive activity would recur.

D. Specifically assigning or permitting an individual with tendencies to anti-social conduct with females (e.g., exposure), to be in an area with access to the women's locker room, contrary to regulations and policy which limited access to ceiling areas.

17. The Defendant has established a security unit for the purpose of protecting West Penn Power, Inc. employees and/or property.

18. These security services were provided in a fashion to the detriment of the Plaintiffs as follows:

A. Failed to adequately control and/or discover and/or lock or secure access ways to the ceiling area over the women's shower/restroom area.

B. Failed to conduct a proper investigation

C. Withheld certain facts from the plaintiffs concerning the identity and opportunity and access to the locker area by the "peeper."

19. Defendant has hired an employee/employees with perverse tendencies or a danger to the security of fellow employees, particularly women.

20. Defendant has been discriminatory in its hiring practices in that it conducts no preliminary screening in an

effort to identify these traits particularly offensive to women.

21. Additionally, the Defendant failed to adequately follow-up complaints and/or allegations to remove such personnel who constitute a danger to their co-workers allowing continued employment.

22. It is noted that as a part of this failure, the peeper/pervert, who has repeatedly exposed himself to female employees remains in the general labor force. At all times, the company has continued to protect this male employee and hence it is obvious that the matter is of a continuing nature. Discovery information has revealed that the individual, Ed Rodebaugh, had exposed himself to employees as outlined and was assigned by supervisors to the ceiling area at the time of initial discovery.

23. Timely complaints were made by the Plaintiffs to the Pennsylvania Human Relations Commission which processed the actions with the Equal Employment Opportunity Commission. On or about October 29, 1996, the Equal Employment Opportunity Commission issued

determinations permitting the Plaintiffs to file these private actions in federal court.

24. The unlawful employment practices and violations of the civil rights herein complained of occurred during the course of Plaintiffs' employment with Defendant and were carried out by the Defendant itself or its agents, servants and employees and were committed solely because of the Plaintiffs' sex.

25. The effect of the policies and practices pursued by the Defendants, as alleged above, has been to limit, segregate, classify and discriminate against the Plaintiffs in ways which

jeopardize their careers and tend to deprive them of employment opportunities by reason of their sex in violation of Title VII.

26. Plaintiffs have surffered, are now suffering, and will continue to suffer distress, damage to their reputation, and humiliation caused by the unlawful policies, practices, conduct, and usage of the Defendant, all to their great damage.

27. By reason of the Defendant's actions, the Plaintiff has found it necessary to retain the services of an attorney in the proceedings and heretofore, and is therefore entitled to attorney's fees pursuant to Sections 706 of Title VII and under the general equity powers of the Court.

28. As a result of the foregoing conduct, Plaintiffs have sustained damages including, but not limited to, the following:

(a) Compensatory damages in an amount to be determined by the Court for emotional suffering.

(b) Compensatory damages in an amount to be determined by the Court for embarrassment, humiliation and loss of enjoyment in life.

(c) Costs and such other relief as this Court shall deem proper.

(d) Punitive damages due to outrageous conduct.

(e) Attorney's fees.

Wherefore, Plaintiffs pray for judgment against the Defendant in an amount to be determined by the jury and such other relief as the Court deems proper. JURY TRIAL DEMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DEBORAH M. BORODATY and DORENE HAZELBAKER, ,	)	
Plaintiffs	)	
vs.	)	No. 97-0163
WEST PENN POWER COMPANY, INC.. a Pennsylvania Corporation,	)	
Defendant	)	JURY TRIAL DEMANDED

RULE 50 MOTION FOR JUDGMENT AS A MATTER OF LAW

AND NOW comes the Defendant, West Penn Power Company, Inc., by and through its attormys, Phillips & Faldowski, P.C.. and files the following Motion for Judgment as a Matter of Law, whereof the following is a statement:

1. This action aileges a violation of Title 7 of the Civil Rights Act as the result of an alleged hostile work envirorunent at the Plaintiffs' place of employment, the Mitchell Power Plant, owned and operated by the Defendant. West Penn Power Company.

2. Plaintiffs have alleged that this hostile work environmnent arose out of two incidents where the Plaintiffs suspect that they were viewed by co-cmployees while using locker and shower facilities at the plant.

3. The Defendant believes, however, that judgment. as a matter of law, must be granted on behalf of the Defendant and. in support thereof. state as follows:

(a) An initial element in a claim for sexual harassment. particularly where a.hostile work environment is alleged, is that there was a "intentional" act of discrimination against the individual plaintiff. Here, there has been no proof that either of the Plaintiffs were actually spied upon by any co-employees. While there has been circumstantial evidence that an opportunity for spying existed, and that one employee, Renee Armel, believed, on or about October 10. 1991. that she "felt" she was being watched, no co-employee has eveT been caught in the act of spying.

(b) Further, no co-employee has ever been caught in the act of spying upon either of the

Plaintiffs hure. Deborah Borodaty or Dorene Hazelbaker, w there is no evidence of an intentional act of discrimination against aie Plaintiffs so as to permit this case to go to a jury, requiring that judgment be granted in favor of the Defendant as a matter of law

(c) Should this Court determine that intentional acts of discrimination or evidence of the same are such that the issue must go to the jury, the Defendant is, nonetheless, entitled to a judgment as a matter of law as there has been no testimony that the intentional discrimination is alleged to be pervasive and regular. In fact, testimony has sbown thAt there are two separate and distinct incidents, one in October, 1991 and one in October, 1994, these two separate incidents hardly being able to be called pervasive or regular.

(d) Even if this Court were to determine that the Plaintiffs have presented evidence sufficient to submit the two described issues to the jury, a motion for judgment as a matter of law is, nonetheless.

required as the Plaintiffs' case in cKief bas sbown sufficient evidence, as a matter of law, that once management was informed of the suspicion of peering, it took prompt action and action which was reasonably expected to.be adequate to address the situation. Specifically, testimony has shown that on the date.the suspicions were made known to management, the access door in the air conditioning.room was welded shut. Further, testimony has shown that within eight to ten days the ceiling area of the women's locker room was pairited over with a textured paint so as to prevent any possibility of viewing from the ceiling area. With regard to the 1994 incident, testimony has shown that the women's locker room, prior to that time, had been isolated by a partition made of drywall in the ceiling area.

4. As such, the Defendant believes that it is entitled to a Motion for Judgment as a.Matter of Law in its favor.

5. Alternatively, should this Court determine the Defendant is not entitled to a Motion for Judgment as a

Matter of Law, the Defendant, nonetheless, believes this Court, as a matter of law, must find that the incident which occurmd in October. 1991 or any claims of sexual harassment as a result of that incident cannot be submitted to the jury as Plaintiffs' claims with regard to that incident are time-barred.

6. Under Title 7, the time limit for filing a charge of employment discrimination with the Equal Employment Opportunity Commission is 300 days from the date of the alleged discrimination. Plaintiffs are precluded from complaining about or presenting evidence regarding the events which preceded the 300 day limitation period, unless the Plaintiffs are able to demonstrate a "continuing violation."

7. To demonstrate a "continuing violation", however, the Plaintiffs must demonstrate that the act is part of an ongoing practice or pattern of discrimination and must show that the harassment is more than the occurrence of isolated or sporadic acts of intentional discrimination and, instead, demonstrate a continuing pattern of discrimination.

Sec Rush v. Scott Specialty Gases, Inc.113 F.3d 476 (3rd Ci.r. 1997).

8. Here, by the Plaintiffs' own admissions during their testimony, between the incident in October. 1991 and the incident in October, 1994, the Plaintiffs did not have any.complaints regarding other incidents of suspected "peering" or "peeping." Furthermore, Plaintiffs testified that between that period of time, other than complaining that the paint job to the ceiling tiles was "not a good job", the Plaintiffs had no complaints regarding sexual harassment or sexual discrimination.

9. The Plaintiffs have been unahle to show a continuing violation, and to the extent there has been testimony that between October, 1991 and October, 1994, that the Plaintiffs did not make complaints, but the main access area was welded, the ceiling tiles were painted over, a partition wall was put up in the ceiling, and the ceiling tiles were replaced, all in an effort to prevent the possibility of peering, the two incidents are isolated so that the 1991 action, as a matter of law, is tirne-barred. See, also.

Konstantopoulos v. Westvago Corp., 112 F.3d 710 (3rd Cir. 1997).

WHEREFORE. the Defendant, West Penn Power Company, requests this Honorable Court grant a Rule 50 Motion for Judgment as a Matter of Law with regard to the Plaintiffs' entire claim or, alternatively, grant a judgment, as a matter of law, that the Plaintiffs' claims for any alleged sexual harassment as a result of the October, 1991 incident are time-barred and that Plaintiffs' claims are limited to allegations of sexual harassment as a result of the October. 1994 incident alone.

Respectfully submitted,

PHILLIPS & FALDOSKI, P.C.
By: _____/s/_____
Damon J. Faldoski, Esquire
By: _____/s/
Kathleen Smith-Delach, Esquire

conducted?

A October 17th I believe that was a Thursday.

Q 1991?

A Yes, sir.

Q Now,were any notes kept of the responses of the employees?

A Yes, sir.

Q Now, did there come a time, on October 17th, 1991, where you conducted an interview of Mr. Edward Rodebaugh?

A Yes, sir.

Q And at that time did you ask him whether or not he was aware of the ladder to the duct area in the air conditioning room?

A Yes, sir.

Q What was his response to that question, if you know?

A As I recall it, he said he had been up there about six months previously. He had been sent up there by Mr. Walter Wietrzykowski to look for a leaking pipe, I believe.

Q Did he give you an indication as to what he observed when he was up there?

A Yes, sir. He said he crawled around, could not find the pipe, but did he see a -- did see some insulation rolled back and he could look into the ladies, locker room, shower room.

Q And he was referring to about six months prior to the date of the interview?

A Yes sir. He said about six months prior to that.

Q Did he indicate how he got to the place where the insulation had been pulled back?

A As I recall, sir, he said that he had crawled around, but didn't specifically say how he got over there.

Q Did he indicate that he had crawled along the duct work?

A Yes, he could have said that.

Q Yes?

A He could have said that, yes, sir.

Q If you were to refer to the notes of the interview, would that help refresh your recollection?

A My notes, yes, sir.

Q Would you do that?

A I didn't note it in my notes, sir.

Q Other than your notes, was there -- were there notes taken by the second investigator?

A Yes, sir. Mr. Callahan took notes.

Q Would a review of those notes help refresh your recollection?

A I could tell you what he has on his notes. I don't recall what he said.

Q Would you be kind enough to review those notes to determine whether it refreshes your recollection on that subject?

THE COURT: Do you understand what that means?

That means, read it to yourself and then see what you remember, not what's written there.

THE WITNESS: Yes, sir.

A No, sir, I don't recall specifically what you are asking.

Q All right. Was there any indication that Mr. Rodebaugh gave that he could see that there was light shining through where the insulation was pulled over?

A I recall him saying that he could look down into the women's shower room at that point.

Q And did he give you an indication as to how it was that he realized that he was looking down into the women's shower room at that point?

A I believe he said because he saw the shower mats on the floor, and I think he said that's when he realized it was the women's locker room.

Q Now, did he give you any indication as to whether he reported that the insulation was pulled back and that someone could be peeping to his supervisor?

A He told me he did not report that because he was looking for the leaking pipe and didn't give that much thought.

Q Did he give you an indication as to what it was -- did he give you an indication as to whether or not he realized that he could be a suspect?

A I believe, sir, he said that -- when Mr. Walt

Wietrzykowski said we were going to interview him that morning, he realized that he was up in the duct work and reminded Mr. Wietrzykowski that he had been up there on a legitimate purpose.

Q Did he indicate to you as to whether or not he was concerned that his fingerprints might be found up there?

A I don't recall him telling me that, sir.

Q Did he indicate to you that he feels that it was, more or less, a prank and that it's blown out of proportion?

A Yes, sir, he did say that.

Q Did he indicate to you that he doesn't think that it was

that bad, that it was done, but just that it was done in work?

A Yes, sir, he said that.

MR. FALDOWSKI: Just let the jury understand we are talking about this incident of October of 191.

MR. SUWAK: That's correct

MR. FALDOWSKI: When you referred to Ilit.11

MR. SUWAK: That would be my understanding.

BY MR. SUWAK:

Q Do you recall anything further about that discussion of Rodebaugh on that topic?

A Specifically, no, sir, other than it was seven years ago and I just have my notes to refresh my memory.

Q Does a review of your notes give you any indication?

A Yes, sir, I could see some light.

Q Now, did you observe any -- see any soda cans or pop cans, or anything of that nature, in the ceiling when you conducted your investigation?

A Yes, sir. There were two soda cans lying on top at the time, on top of the insulation at the time.

Q Did you secure those cans as evidence?

A No, sir, I did not.

Q There came a time when you had discussions, I believe, with Deborah Borodaty concerning these incidents?

A Yes, sir.

Q At any time, did you inform her that Mr. Rodebaugh had told you that he had been in the ceiling area approximately six months prior to October of 191, had observed the insulation pulled back and was able to see down into the ladies, locker area, particularly the mats, and had not reported that to his supervisor?

A No, sir. I did not tell her that.

Q Did you tell that to Dorene Hazelbaker?

A No,sir, I did not.

Q Did you tell that to Carol Levandoski?

A No,sir, I did not.

Q Did you tell that to Emily Rhoads?

A No, sir, I did not.

MR. SUWAK: That concludes my questions of the

take a recess

(End of sidebar discussion.)

(Court recessed at 3:55 p.m.)

(Court reconvened in the conference room at 4:25 p.m.)

THE COURT: The defendants have made their motion in writing and I will discuss the matters that they have raised here and what they haven't raised. In your summary judgment motion, just as in your motion now, you only talk about the peeking, and I am going to make some rulings on that. But, you don't address the other things of the hostile work environment, such as the alleged calendars and pictures, and so forth.

MRS. SMITH-DELACH: I understand that, Your Honor

THE COURT: That can amount to a hostile work environment, and it has nothing to do with the peeking and, I mean, there is evidence for the jury to consider on that.

But, let's start with, in their motion, the first thing they raise is, is there sufficient evidence that peeking took place, to start with? Because peeking certainly can amount to a hostile work environment if it did take place.

MR. SUWAK: May I make a brief remark on that?

THE COURT: Sure.

MR. SUWAK: Judge, our case in that regard, on whether or not there was inappropriate peering, would be premised on numerous factors.

Initially, the idea that the area directly over the shower was -- had the insulation pulled back would indicate someone had intentionally altered the ceiling area permitting the viewing.

THE COURT: But,there is no evidence of when that took place or who that was --

MR. SUWAK: The evidence would suggest --

THE COURT: -- or whether it was done for a legitimate purpose.

MR. SUWAK: we cannot imagine a legitimate purpose for that fact.

THE COURT: Well, you didn't produce any evidence to that effect though that there is no legitimate purpose for which you would have to put insulation back.

MR. SUWAK: Well, Judge, I don't know how I could show the absence of a legitimate purpose under the

circumstances. But, let me just -- I appreciate the Court's concerns.

THE COURT: Sure. Good.

MR. SUWAK: So, that's our first step.

Okay. The second step is, is that there is soda cans up there which are testified to by Mr. DeCree, suggesting that that is not a job-related function to be up there in the area. I am just going step by step.

THE COURT: As to that step, why wouldn't workmen, who go up there for legitimate reasons, get thirsty and drink soda, as well as people who might be up there for illegitimate?

You haven't shown -- first of all, you haven't shown any evidence that anyone was up there for an illegitimate purpose.

MR. SUWAK: Okay. The third item then, and this is where the whole thing comes to the fore, there is testimony that Mr. Rodebaugh was in the ceiling and peering through. Now--

THE COURT: Six months before.

MR. SUWAK: That's right. That's right.

THE COURT: That is the only evidence we have.

MR. SUWAK: But,that's indicative of -- I mean, honestly indicative clearly of a peering. Now --

THE COURT: No. There was no evidence that he viewed anybody in the shower or anybody in there at all, only that he could look down into the ladies' locker room.

MR. SUWAK: All right. Now, that's where, I believe, you have to take into account the testimony associated with his prior exposures. In other words, once we put this man up into the ceiling area, we have to consider whether or not it's for a legitimate purpose or not a legitimate purpose.

Now, we submit --

THE COURT: Well, the only evidence is that he was up there for a legitimate purpose.

MR. SUWAK: Well, but we submit that if you consider the circumstances associated with his uncontrolled impulses associated with exposure, that if you read that in combination with his present situation --

THE COURT: You are saying that there is some connection between exposing yourself to women and peeking on women?

MR. SUWAK: I am saying that there is an inability to control your impulse to gratification of this type.

THE COURT: You presented no scientific evidence that the two are connected. That might be your views that they are connected, but I don't think that there is any evidence that the jury could base a connection.

MR. SUWAK: Well, as I am going through my circumstances, I'm pointing that to an indication that I think would not require expert testimony in order to understand that a person's impulses are not normal.

Now, so the combination of the -- of course, the full testimony is not just the soda cans and cigarette butts which, by the way, under company policy, according to the testimony, there should not be any smoking up in that area because it would be based on Mr. Faldowski's inquiry, I believe, something of a --

THE COURT: So, only peekers would smoke up there?

MR. SUWAK: In other words, if the question is, if I am engaged in a legitimate job function, why can't I have a soda pop? Well, there is a reason why you wouldn't be smoking up in that area.

Now,the other thing is, is that that is an asbestos area. And according to the testimony of Mr. Dolence, he was undertaking the research work associated with these asbestos removals, and that in the absence of an emergency issue, there would not be people up there.

THE COURT: No, that wasn't his testimony. His testimony was there were legitimate reasons working on various pieces of equipment up there would be -- there were legitimate reasons why people would be up there.

MR. SUWAK: Well, this actually makes it all the more hard to understand, in that if we have an area where we expect people to be up there, and we have the evidence that the ceiling is wide open for a six-month period, despite the fact that there would be numerous people up there, whether you a.re up there for a legitimate --

THE COURT: No testimony there were numerous people up there. There was testimony that there were people up there for legitimate reasons.

MR. SUWAK: No one ever explained Mr. Druga coming down that ladder.

THE COURT: They don't have to explain it. You have the burden of proof. They don't have the burden of disproof.

MR SUWAK: When I asked Mr. Dolence of any legitimate reason for Mr. Druga - -

THE COURT: He didn't know.

MR. SUWAK: That's right.

THE COURT: He didn't know why he was up there.

MR. SUWAK: No. He didn't know that there was any legitimate reason.

THE COURT: He didn't know there was any illegitimate. He didn't know why he was up there.

MR. SUWAK: Am I not entitled, Judge, to the benefit of the inference at this stage when I look at all the circumstances?

THE COURT: Well, you claim you are. But, I'm saying that there is nothing from which an inference can reasonably be drawn.

So, in that respect, I'm ruling, as a matter of that the claim based upon the peeking is -- the motion is granted, as a matter of law, based upon the fact that there is insufficient evidence from which a reasonable jury could find that peeking took place at all, and so those incidents are out of the case.